PAKISTAN – ANTI-DUMPING MEASURES ON BIAXIALLY ORIENTED POLYPROPYLENE FILM FROM THE UNITED ARAB EMIRATES

(DS538)

THIRD PARTY SUBMISSION OF THE UNITED STATES OF AMERICA

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US – OCTG (Argentina) (AB)	Appellate Body Report, *United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – OCTG (Mexico) (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005

I. INTRODUCTION

1. The United States welcomes the opportunity to present its views to the Panel. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement") as relevant to certain issues in this dispute.

II. ARTICLE 5.10 OF THE ANTI-DUMPING AGREEMENT DOES NOT CONTAIN OBLIGATIONS CONCERNING THE LENGTH OF DOMESTIC JUDICIAL REVIEW, INCLUDING REMAND PROCEEDINGS

2. The United Arab Emirates ("UAE") contends that Pakistan violated Article 5.10 of the Anti-Dumping Agreement by allowing three years to elapse between the initiation of the investigation on April 23, 2012, and the end of the investigation, which it contends is the publication of the National Tariff Commission's (NTC's) notice of final determination on April 9, 2015.[1] While the UAE acknowledges that Pakistan published a notice of final determination in this investigation on February 7, 2013, that was "set aside" during a challenge in the Pakistani courts, the UAE does not consider that this determination "concluded" the investigation, arguing that Pakistan conducted further "reviews and appraisals of the facts" following the judicial review.[2] Specifically, the UAE argues that Pakistan exceeded the strict time limit of 18 months for investigations specified in Article 5.10 as the notice of final determination on April 9, 2015, which "imposed the definitive measure," represents the end of the investigation.[3]

3. Pakistan responds that the NTC issued the final determination in this matter on February 7, 2013, and that after a "domestic court challenge, and a remand resulting from that court challenge," it was only a "ratification" of the final determination that took place on April 9, 2015.[4] Because the NTC's investigation took place within an 18 month period based on this timeline, Pakistan states that is has met its obligations as set out in Article 5.10.[5]

4. The UAE's understanding of Article 5.10 is contrary to the plain terms of that provision. Article 5.10 requires that "[i]nvestigations shall, except in special circumstances, be concluded in one year, and in no case more than 18 months, after their initiation." The time frame in Article 5.10 applies to "investigations" only, and not to the judicial review of an investigation or an administering authority's subsequent response to that judicial review.

5. In claiming that Pakistan's investigating authority exceeded the 18-month limitation in Article 5.10, the UAE implies that the 18 months includes the time taken to complete any and all of the following procedural steps: (1) all investigatory activities and determinations made in the normal course by the investigating authorities; (2) the time it takes for a domestic court (or courts) to hear and decide any requests for review of the investigating authorities'

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[1] UAE's First Written Submission, paras. 151-160.

[2] UAE's First Written Submission, paras. 154 and 166.

[3] UAE's First Written Submission, paras. 157 and 160.

[4] Pakistan's First Written Submission, paras. 3.114-3.116.

[5] Pakistan's First Written Submission, para. 3.114.

determinations; and (3) the investigating authorities' re-examination and re-determination on remand, if necessary. The UAE's interpretation might also extend to (4) any judicial review of the redetermination, (5) any further re-examination or redetermination following a second judicial remand, or even (6) any repetitions of the foregoing steps. Nothing in Article 5.10 would support such an interpretation.

6. Moreover, the UAE's efforts to argue that it is inequitable to allow additional time in addition to 18 months for judicial review and possible remand proceedings[6] ignores that Article 13 of the Anti-Dumping Agreement explicitly contemplates the possibility of such additional proceedings after the investigating authorities issue their final determinations in the first instance. Whereas Article 5 of the Anti-Dumping Agreement governs the conduct of "investigations," an entirely separate Article, Article 13, addresses judicial review proceedings.[7] With respect to timing, Article 13 requires only that judicial review proceedings be "prompt." Article 13 does not contain any specific durational requirements for domestic judicial review, nor does it cross-reference the 12-month/18-month deadlines set out in Article 5.10 for completion of investigations.

7. The UAE's interpretation of Article 5.10 thus seeks to impose requirements nowhere stated in the text and indeed appears to be inconsistent with Article 13 of the Anti-Dumping Agreement. The UAE's interpretation thus does not provide a basis for a claim under Article 5.10.

III. Claims Regarding Profitability Under Article 3.4 of the Anti-Dumping Agreement

8. The UAE claims that Pakistan failed to undertake an adequate evaluation of profitability, as required by Article 3.4 of the Anti-Dumping Agreement.[8] Specifically, the UAE noted that the Pakistani authority found the domestic industry was profitable during the entire period of investigation, but nevertheless concluded that it had suffered material injury "on account of profits" because these had decreased somewhat over the period of investigation.[9] The UAE argues that if an industry or producer's profitability decreases, but remains high in absolute terms, it "is still very profitable and not in any way suffering injury, let alone material injury."[10]

9. Without commenting on the actual facts of this investigation, the United States notes that a negative material injury determination is not compelled merely because a domestic industry

[6] UAE's First Written Submission, para. 169.

[7] Article 13, entitled "Judicial Review," provides as follows:

> Each Member whose national legislation contains provisions on antidumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

[8] UAE's First Written Submission, para. 404.

[9] UAE's First Written Submission, para. 397 (quoting the NTC's administrative determination).

[10] UAE's First Written Submission, para. 400.

has remained profitable during the period of investigation. As Article 3.4 of the Anti-Dumping Agreement states, "the list [of injury factors] is not exhaustive, *nor can one or several of these factors necessarily give decisive guidance* (emphasis added)." Furthermore, Article 3.4 does not direct an investigating authority to determine if the domestic industry has fallen from profitability to loss. Instead, Article 3.4 requires the authority to evaluate, among other things, the "actual and potential decline in… profits".

10. Therefore, a Member would not breach Article 3.4 based on the sole fact that the domestic industry had remained profitable. Rather, an investigating authority may find that dumped imports have caused material injury to a domestic industry based on factors identified in Article 3.4, including that industry remaining profitable, depending on the specific facts and circumstances of a given case.

IV. CLAIMS REGARDING LIKELIHOOD OF INJURY DETERMINATIONS UNDER ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT

11. The UAE claims that Pakistan's likelihood-of-injury determination did not establish through a forward-looking analysis that continuation or recurrence of injury in the event of expiry was likely, as required by Article 11.3.[11] The UAE supports its contention by highlighting that the domestic producer's market share increased during the period of review to a "quasi-monopoly" level, which, the UAE suggests, compels a negative likelihood-of-injury determination.[12]

12. Article 11.3 of the Anti-Dumping Agreement requires termination of an antidumping duty order not later than five years after its imposition unless the investigating authorities determine "that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." By its terms, Article 11.3 does not identify any specific methodology for investigating authorities to use or particular factors that investigating authorities must take into account in making such a determination.[13] And as past reports have recognized, "investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination."[14]

13. While Article 11.3 directs an investigating authority to consider whether "expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury," it is important to recall that Article 11.3 of the Anti-Dumping Agreement does not prescribe what data an investigating authority must consider in conducting such an examination.[15] And nothing in that

[11] UAE's First Written Submission, para. 550.

[12] UAE's First Written Submission, paras. 552-553. Specifically, the UAE states that "to the extent it could be" that imports could after termination increase from a negligible presence to "capture some market share, there is no basis to conclude that this would support a finding that 'material injury' is recurring." UAE's First Written Submission, para. 553.

[13] *See US – OCTG (Argentina) (AB)*, para. 281; *US – OCTG (Mexico) (AB)*, para 151.

[14] *US – OCTG (Argentina) (AB)*, para. 280. Original emphasis.

[15] *US – OCTG (Argentina) (AB)*, para. 281; *US – OCTG (Mexico) (AB)*, para 151.

Article precludes authorities from analysing both current and historical – including pre-order – data in conducting their analyses.

14. By the same token, nothing in Article 11.3 indicates that the current condition of the industry must be given specific weight, let alone dispositive weight, in the likelihood of injury analysis. Indeed, through the term "recurrence of … injury", Article 11.3 contemplates a situation in which the domestic industry had ceased to experience injury. Consequently, the Agreement does not support a conclusion that a domestic industry's current market share would compel a negative likelihood-of-injury determination.[16] Rather, the investigating authority may evaluate a variety of available data in determining whether "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."

V. CONCLUSION

15. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of relevant provisions of the Anti-Dumping Agreement.

[16] *See* UAE's First Written Submission, paras. 552-53.